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OCTOBER TERM, 1899. No. 174.

Supreme Court of United States

Filed Mar. 5, 1900.

THE CAMDEN AND SUBURBAN RAILWAY COMPANY,

Plaintiff in Error.

vs.

DAVID S. STETSON,

Defendant in Error.

ON CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF R. A. ARMSTRONG,

For Plaintiff in Error.

Supreme Court of United States.

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THE CAMDEN AND SUBURBAN RAILWAY COMPANY, Plaintiff in Error, vs. DAVID S. STETSON, Defendant in Error.	ON CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF E. A. ARMSTRONG,
for Plaintiff in Error.

This cause was originally tried in the United States Circuit Court for the Third Circuit, District of New Jersey. The defendant in error was the plaintiff in that cause, and on the verdict of the jury obtained a judgment for thirty-five hundred dollars, upon the ground of the negligence of the plaintiff in error, the defendant in error being a passenger on one of its cars. By a writ of error sued

out by the railway company, this cause was taken to the United States Circuit Court of Appeals for the Third Circuit and there argued, and that Court has certified to this Court three questions, asking its direction in the premises, which are as follows:

1. Is the above recited statute of the State of New Jersey, the act of May 12th, 1896, applicable to an action to recover damages for injury to the person brought and tried in the Circuit Court of the United States for the District of New Jersey?

2. Is said statute applicable to an action to recover damages for injury to the person brought and tried in the Circuit Court of the United States for the District of New Jersey, where the injury occurred in the State of New Jersey, and both the plaintiff and the defendant at the time of the injury were citizens of that State?

3. Had the Circuit Court the legal right or power to order a surgical examination of the plaintiff?

These questions arose under this assignment of error:

"First. That on or before the trial of said cause the Court refused and denied the application of the defendant to order and direct an examination of the plaintiff, as to the injury complained of by him in his declaration, by competent physicians and surgeons, in order to qualify such physicians and surgeons to testify in such case as to the nature, extent and probable duration of the injury complained of, on the ground that it was beyond the power of the Court to grant such application or make such order."

This being a trial for personal injuries, the defendant in that cause, the railway company, gave notice to the

defendant in error, Stetson, that at the trial it would ask for a personal examination under and by virtue of an act of the Legislature of the 12th day of May, 1896, found in the Laws of New Jersey, 1896, page 344, which is as follows:

"Chapter 212.

"A supplement to an act entitled 'An act concerning evidence' (revision) approved March twenty-seventh, one thousand eight hundred and seventy-four.

"Be it enacted by the Senate and General Assembly of the State of New Jersey:

"1. On or before the trial of any action brought to recover damages for injury to the person, the Court before whom such action is pending may from time to time, on application of any party therein, order and direct an examination of the person injured as to the injury complained of by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination to testify in the said cause as to the nature, extent, and probable duration of the injury complained of; and the Court may in such order direct and determine the time and place of such examination; provided, this act shall not be construed to prevent any other person or physician from being called and examined as a witness as heretofore.

"Approved May 12th, 1896."

The proceedings on that motion will be found on page 2 of the certificate. As will be thus seen, the trial Court declined to make an order for an examination solely on the ground of lack of power.

There was no question of its being before the trial, for it was on the trial; or without notice, for notice had been given; or the absence of the plaintiff's physicians, for they were there; or anything interfering with the orderly conduct of the trial. In other words, the sound discretion of the Court was not invoked against the application. The trial court stated he thought it was a proper thing to have such an examination, but that he did not think the Court had any right to compel the plaintiff to submit to it against his will.

This question in this form has never been before this Court, and we have from this tribunal no guide in this aspect of it. It comes squarely upon a statute, divested of the troublesome questions as to the exercise of the discretion of a trial judge often involved.

This Court, by the majority opinion, in the case of the *Union Pacific Railroad Co. vs. Botsford, 141, U. S., page 250*, dealt with the subject of the power of the Court to order a physical examination, independent of any statute, and held that that power did not exist at the common law.

In dealing with this subject the dignity of manhood and the sacredness of the human person are both emphasized, and rightfully so. But in this emphasis sight must not be lost of the fact that the establishment of justice has a pre-eminent place in the formation of our government. A man's person and his property are both the subjects of the solicitude of the law, which resents, as an affront of the gravest character, an invasion of either. Upon principle, so far as I can see, one cannot be raised above the other, and the law will use and may use all its power to prevent a trespass upon either. If, therefore, under the forms of law a man is endeavoring to take another's prop-

erty, justice calls upon him to clearly establish his right so to do by the best evidence in his power, and that thing which does no more than this would seem to be affording only the equal protection of the law to all.

It may be that the common law is deficient in rules and proceedings to conveniently arrive at the fact, from the non-residence of witnesses the necessity to inspect books and the like, and therefore numerous remedial acts have been passed. Of such a character is the act under discussion.

The only objection to a statute of this sort is the charge that it is unconstitutional. The broad position may be laid down safely, I take it, that nothing is unconstitutional which brings to light the very truth of a matter in dispute. The answer will at once be made to that: Granting that proposition will justify all sorts of seizures, searches and questions. That is not true any more than it would be true to charge that a statute allowing a discovery, compelling the defendant to disclose all his means and all his property, was an invasion of his constitutional rights.

Section 914 of the U. S. Revised Statutes contains the following provision:

"The practice, pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

It would seem, therefore, that it is necessary for us to

go to New Jersey to find what the method of procedure in a case brought in the Circuit Court for the District of New Jersey would be.

In the case of the *Conn. Mutual Life Ins. Co. vs. Schaefer, 64 U. S., p. 458*, the Supreme Court of the United States in discussing this subject, said:

"The laws of the State are only to be regarded as rules of decision in the Courts of the United States where the Constitution, treatise, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that is to say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for Congress to declare the rules of evidence which shall prevail in the Courts of the United States, not affecting rights of property; and where Congress has declared the rule, the State law is silent."

The same Court, in the recent case of *Sheppers vs. Adams*, upon the subject, *163 U. S., p. 625*, said:

"It was the purpose of Congress, by this statute, to bring about a general uniformity in Federal and State proceedings in civil cases, and to confer upon suitors in Courts of the United States the advantages and remedies provided by State legislation."

And held that a State statute would be enforced in a Federal Court if it was not in conflict with the act of Congress or an established rule of the Court.

In a very late case, *Brown vs. State of New Jersey*, opinion filed November 20th, 1899, the same doctrine is enunciated.

If in the majority of the States the old rule still applied, denying the admissibilty of a party to a suit as a witness in his own behalf, and New Jersey had been a pioneer in removing that disability, would it be for a moment claimed that the Circuit Court in a trial in the District of New Jer-

sey would be justified in denying the competency of such witness in the absence of any Federal statute or rule of Court?

The Courts of many States, in the absence of statute on the subject, have held that they had inherent power to make such an order requiring the plaintiff to submit to an examination, and that it is error to refuse it in the proper cases.

Alabama G. S. Ry. Co. vs. Hill, 8 Southern, 90. (1890).

Richmond & D. R. Co. vs. Childress, 9 S. E., 602 (1889.)

Owens et al. vs. Kansas City, St. J. & C. B. R. Co., 8 S. W., 350 (1888).

White vs. Milwaukee City Ry Co., 21 N. W., 524 (1884).

Missouri Pac. P. Co. vs. Johnson, 10 S. W., 325 (1888).

Hatfield vs. St. Paul & D. R. Co., 22 N. W., 176 (1885).

Stuart vs. Havens, 22 N. W., 419 (1885).

Atchison, T. & S. F. Co. vs. Thue, 4 Pac., 352 (1884).

Turnpike Co. vs. Bailey, 37 Ohio, 104.

All of the above cited cases, as will be seen, antedate the case of *Union Pacific Railway Co. vs. Botsford, supra*, which was decided May 25, 1891. The jurisdictions holding to the contrary are referred to in the opinion in the *Botsford case*. Of these New York is one. But the Legislature of that State, in the year 1893, in recognition of the lack of judicial power, by Chapter 721 of the laws

of that year, amended section 873 of the Code of Civil Procedure by inserting the following as new matter:

"In every action to recover damages for personal injuries, the Court or Judge, in granting an order for the examination of the plaintiff before trial, may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons to be designated by the Court or Judge, and such examination shall be had and made under such restrictions and directions as to the Court or Judge shall seem proper. In every action brought to recover damages for personal injuries, where the defendant shall present to the Court or Judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the Court or Judge shall order that such physical examination be made."

Based upon that statute, the New York Courts now decide that they have power to order examinations.

Lyon vs. Manhattan Ry. Co., 142 N. Y., 298 (1894).
Sewell vs. Butler, 44 N. Y. S., 1074 (1897).
Green vs. Middlesex R. Co., 32 N. Y. S., 177.

In view of the decision of this Court in the *Botsford case*, I have been interested to see what courts have done on this subject since that case was decided, with a view to ascertain if any case intimated that an act allowing a physical examination infringed on any constitutional right. I could find no suggestion at all looking in that direction.

Here are all of the principal cases upon the subject:

Gulf, &c. Railway Co. vs. Nelson, 5 Tex. Ap., 387; 24 S. W. Rep., 588. September 4, 1893.

Error was assigned on refusal to order a personal examination, but the inspection did not show sufficiently the ground for the refusal, so that Appeal Court could not say whether it was justifiable or not.

Hall vs. Town of Manson, 99 Iowa, 698; 68 N. W. Rep. 922. October 29, 1896.

"As the plaintiff had the right in such a case to exhibit his injured limb to the jury, in order to show the extent of his suffering, he may in a proper case and under proper circumstances be required to do the same thing for a like purpose, upon the requirement of the other party."

St. Louis S. W. Railway Co. vs. Dobbins, 60 Ark., 481; 31 S. W. Rep., 147. May 25, 1895.

The power of the Court to order personal examination outside of Court, is admitted.

Pennsylvania Co. vs. Newmeyer, 129 Ind., 101; 28 N. E. Rep., 860. October 28, 1891.

"There is no statute in this State, conferring upon the Circuit Court the power to make such an order as was asked in this cause. If such power exists, it is a power that inheres in the Court independent of any statutory provisions. * * * We think the better reason is against the existence of such a right and in the absence of some statute upon the subject we do not think the Courts should attempt to compel litigants, against their will, to submit their person to the examination of strangers for the pur-

pose of furnishing evidence to be used on the trial of the cause."

Graves vs. City of Battle Creek, Mich., April 7, 1893, 54 N. W. Rep. 757.

In discussing the authority of the Court to make the order, it is held, "The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the Court under proper restrictions, the rule recognizing, however, that a wide discretion is vested in the trial court."

And in the same case, in discussing the decision in Railroad Co. vs. Botsford, the Court said:

"This decision is entitled to very great weight, but in view of the manifest justice of a requirement that the plaintiff in case of personal injury shall produce the best evidence attainable, we think this case should not be permitted to stem the otherwise almost unbroken current of authority upon the subject. It is true that the rule is one of modern growth, but it is also true that actions for personal injury, while not of modern origin, are rapidly increasing, and are constantly presenting new questions. The rule is well recognized by substantially all the Courts of the country that the injured party may exhibit his wounds to the jury in order to show their nature or extent, and that rule has been followed in this State. Testimony which is open to one party ought logically to be open to his opponent, if it can be obtained with due regard to decency, and in the orderly conduct of the trial."

This Court also says: "The case of Lloyd vs. Railroad Company, 53 Mo., 509, cited by Mr. Justice Grey, in Railroad Co. vs. Botsford, is not now the law of Missouri, as

will be seen by reference to Owen vs. Railroad Co. above cited."

See Owens vs. Railroad Co., 8 S. W. Rep., 350.

Belt Electric Line Co. vs. Allen, 44 S. W. Rep., 89.
Kentucky, January 11, 1896.

"The question whether a plaintiff in an action for damages for permanent injuries to his person may be required to submit to medical examination has received considerable attention in some of the States, but appears not to have arisen here. It is the contention of the company that such an examination is proper, because the law requires, in every case, the production of the best evidence that the nature of the subject admits of, and will not be satisfied with any evidence where better evidence is withheld or concealed by a party able to produce it; that, as the object of judicial inquiry is the ascertainment of the truth, the law will not allow the truth to be sacrificed by concealment of the means of its discovery. The decisions are not entirely uniform on the subject, but we think the weight of authority is with counsel for appellant, and such physical examination may be demanded in cases where discovery of the truth will more likely result with, than without, the examination, and the ends of justice be thereby better subserved. The conclusions which the various courts and some of the text writers have reached are these: (1) That trial courts have the power to order surgical examination by experts of the person of a plaintiff who is seeking to recover for personal injury; (2) that the defendant has no absolute right to have an order made to that end, but that a motion therefor is addressed to the sound discretion of the Court; (3) that the exercise of that discretion will

be reviewed on appeal, and corrected in case of abuse; (4) that the examination should be ordered and had under the direction and control of the Court, whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to the plaintiff's life or health, and without the infliction of serious pain; (5) that the refusal of a motion, when the circumstances present a reasonably clear case for examination under the rules stated, is such an abuse of the discretion lodged in the trial court as will demand a reversal of a judgment in plaintiff's favor."

O'Brien vs. City of LaCrosse, 99 Wis., 421; 75 N.W. Rep., 81. May 3, 1898.

"It seems that courts differ widely as to the absolute right of such personal examination in the absence of statute, by physicians or experts of the opposite party. Some courts deny the right altogether. Some hold that an absolute right to such an examination exists at common law; such differences of opinion may be accounted for in part by the difference of circumstances under which such examinations were requested. The better opinion, in our judgment, makes the right n the absence of statute to rest in the sound discretion of the trial court." In that case, under the circumstances, the examination was refused.

Joliet Street Railway Co. vs. Call, 143 Ill., 177; 32 N. E. Rep., 389. October 31, 1892

Examination was refused, but there was no denial absolutely of the power of the Court to do it.

Chicago, &c., Railway Co. vs. Langston, 48 S. W. Rep., 610 Tex. December 31, 1896.

A rule prevails in this State upon the application of the defendant before the trial to require the plaintiff to submit to a personal examination.

The same case appears in *47 S. W. Rep., 1027.*

Southern Kansas Railway Co. vs. Michaels, 57 Kansas, 474; 46 Pac. Rep., 938. December 5, 1896.

This case, citing Railroad Co. vs. Thul, 29 Kan., 466, says: "In the Thul case it was said that upon such application the Court should exercise a sound judicial discretion and the order for examination should be made upon a proper application and upon a proper showing." In this case the application was refused.

Smith vs. Spokane, 16 Wash., 403; 47 Pac. Rep., 888. February 3d, 1897.

"That the trial court is vested with a wide discretion in the exercise of such power, and that it may refuse to grant such an order as was here requested when the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, or where the necessities of the case do not demand it, or where, in the judgment of the Court, the examination would not materially aid the jury, seems to be established by the authorities." This application was made after the physicians for the plaintiff had testified.

It will be seen that no manner of doubt is by these cases cast upon the legislative power. The act in question seems to be ample, and was ample to give the authority

desired. It has been challenged in our Supreme Court, however, and we are now fortunate in having, as we did not have before the Circuit Court of Appeals, an opinion in every particular upholding the act: The case of *McGovern vs. Hope, 42 Atlantic Rep., page 830*, filed February 27, 1899. It is not as yet published in the State reports, but will appear in 63 Law (34 Vroom).

This opinion is quite an exhaustive one and all the points that may be raised against this statute were there made and disposed of and the constitutionality of it entirely upheld.

Supposing this to be an action for damages for wrongful death under the death damage act, and New Jersey had on its statute books a limitation of the amount recoverable; at the time the cause of action arose both defendant and plaintiff were citizens of New Jersey, and afterwards the plaintiff removed to Pennsylvania, which had no such restriction, and brought suit, wouldn't it be held that the plaintiff would be bound by the limit in the New Jersey act? The answer made to that, of course, will, that at common law, in the absence of the statute, there could be no action maintained for wrongful death, and as the cause of action itself was created by statute, it was entirely within the power of the Legislature to make such a limit. But in principle is that any different from this case? This defendant and this plaintiff, at the time of the making of the contract out of which this tort complained of arose, and at the time of the commission of the tortious act, were residents of New Jersey, and when the plaintiff became a passenger on the cars of the defendant company, it was with the express contract that if damage accrued to him in any way the company should be entitled to ascertain

from skillful physicians and surgeons the extent of such damage. He obtained the advantage of that contract, and can he, by simply changing his residence to another State and so being entitled to bring an action in the United States Circuit Court, skip from the responsibilities under which his contract was made?

The business of maintaining suits for damages against corporations on the ground of negligence is of comparatively recent origin, but that it is a business needs only a reference to the reports of any of our Courts to see. Any statute, therefore, designed to ascertain the truth and to make clear and plain the facts, ought, if possible, to be upheld.

It is respectfully submitted that Chapter 202 of the 1896 Laws of the State of New Jersey, above quoted, is a proper exercise of the legislative authority; it prescribed the mode of precedure in the Courts of the State of New Jersey that by the Federal statutes are binding on the Circuit Court of the United States for the District of New Jersey, and that the queries propounded by the Honorable, the Circuit Court of Appeals in the Third Circuit, in each case, should be answered in the affirmative.

E. A. ARMSTRONG,
Attorney for Plaintiff in Error.

Camden, N. J., February 24th, 1900.

ON CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE PLAINTIFF IN ERROR.

Supreme Court of United States.

THE CAMDEN AND SUBURBAN RAILWAY COMPANY, Plaintiff in Error, and DAVID S. STETSON, Defendant in Error.	ON QUESTIONS CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT.

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BRIEF OF THE PLAINTIFF IN ERROR,
by D. J. PANCOAST, Counsel.

The Certificate of the Circuit Court of Appeals presents three questions for the consideration of this Court of Last Resort as follows: 20

1. Is the above recited statute of the State of New Jersey, the act of May 12th, 1896, applicable to an action to recover damages for injury to the person brought and

tried in the Circuit Court of the United States for the District of New Jersey?

2. Is said statute applicable to an action to recover damages for the injury to the person brought and tried in the Circuit Court of the United States for the District of New Jersey, where the injury occurred in the State of New Jersey and both the plaintiff and the defendant, at the time of the injury, were citizens of that State?

3. Had the Circuit Court the legal right or power to order a surgical examination of the plaintiff?

The case of the Union Pacific R. C. Co. vs. Botsford, 141 U. S., 250, did not involve the same state of facts as contained in this case, and, therefore, it does not necessarily control the questions here presented. In that case the defendant asked for an order for the examination of the plaintiff *out of Court and in advance of the trial; and, in the absence of any statute on the subject, it was denied.*

The statute in question in this case has been held to be valid by the New Jersey Supreme Court, in an opinion recently delivered in the case of McGovern vs. Hope, 42 Atlantic Reporter, page 830.

In New York, where the practice was formerly denied, a statute similar has been passed, which the Courts of that State have sustained as legal. Sewell vs. Buller, 44 N. Y. S., 1074; Green vs. Middlesex R. R. Co., 32 N. Y. S., 177; Lyon vs. Railway Co., 142 N. Y., 113.

If the law does not allow the examination asked for in this case, it would seem to be, in this one respect, a very undeveloped or irrational science.

A man charged with a crime, and presumptively innocent, may be seized and imprisoned until he is tried; one may be seized upon a capias and imprisoned by the order

of the Judge before he has been convicted or even had an opportunity to be heard; one may be adjudged guilty of a contempt of Court for some little misdoing in the presence of the Court and summarily imprisoned; all without any suggestion that such procedure is an invasion of his personal rights, unconstitutional, or contrary to the fundamental principles of our laws. Can it be, that while such arbitrary powers may be exercised by the Court, it cannot be trusted with the power to order a plaintiff to exhibit the hurt or wound for which he is seeking to obtain damages? A alleges that B's servant hurt him whereby he has lost the sight of his eye, which outwardly seems good. B says, let my surgeon examine your eye in open Court to see if in his judgment the sight is really lost. The defendant replies, no, that is neither your privilege nor right; such a proposition involves a violation of my constitutional right. Is the Court, when appealed to, hereafter, to be obliged to say that such is the law to the open and manifest obstruction of justice? If it be the law then there can arise to the plaintiff no prejudice whatever from the advantage taken of it by him in refusing to exhibit or furnish the best evidence in his possession of the truth of his case.

It is entirely safe to assert that in a great many personal injury cases, justice cannot be properly done to the defendant without an opportunity to have the subject of the injury examined in the ordinary way of such examinations, which people are accustomed to voluntarily undergo when they want to know their own true physical condition. And to hold that the plaintiff may avail himself of such an examination by his own surgeons and physicians, and deny a corresponding right to the other side, is to

subordinate the substantial rights of the defendant to the very unsubstantial and somewhat sentimental right of the plaintiff, behind which is masked the motive born of a desire to recover the largest damages.

Suppose the plaintiff's physician in such a case should testify that the plaintiff lost the use of his hand by the injury complained of, ought the Court to be denied the power to order the plaintiff to let the defendant's physician look at it or examine it, so as to enable him to give his judgment as to its condition? If this question could be put to the whole of mankind, the universal reply would be, no. Any other conclusion would be revolting alike to reason and common sense, upon which our judicial system is supposed to rest.

"Let justice be done though the Heavens fall," is one of those trite sayings, expressive of the general sentiment of mankind. I appeal to that same sentiment and sense of right, expressed in this modification of it: "Let justice be done though it requires the plaintiffs in damage cases to submit themselves to a reasonable surgical examination in relation to the injury complained of."

The object of the New Jersey Statute is highly beneficent and remedial. It is to secure, at the trial of personal damage cases, the best evidence of the truth relating to the injury complained of. The plaintiff in such a case usually fortifies his own account of his injuries with that of his own private physician, who, in a great majority of cases, assumes the role of a partisan, strongly inclined to make the most for his patient and client, and gives his view of the injuries based upon a private physical examination. Why, then, should not the plaintiff, in the interest of fairness, truth and justice, be obliged, if unwilling, to afford

his adversary the same reasonable opportunity to get at the facts of his case?

The broad underlying principle that ought to control this question is that whatever is reasonably necessary in the administration of justice is lawful, neither unconstitutional nor violative of any fundamental principle of the common law. It has often been said by the admirers and expounders of the common law, that it is sufficiently broad and flexible to accommodate itself to the many new wants of advancing knowledge and civilization; and to hold that it stands inflexibly in the way of new practices, made necessary by modern needs, would be to condemn it as unworthy of that high place which it has heretofore been given in jurisprudence.

The great number of personal damage cases that fill our modern Courts (many of which are of a wholly speculative character), call for the exercise of the greatest care, and the use of every proper safeguard to elicit the truth.

When a plaintiff brings a defendant into Court, he impliedly, at least, submits himself to all terms reasonably suited to develop the truth. If a party should have any books, papers, or other personal property that would be evidence as to the facts in question, neither his constitutional nor common law rights would avail him as against the order or process of the Court requiring him to produce and exhibit them.

The power of the Court to order a view of property, which is the subject matter of a trial, cannot well be disputed at this time, in view of its almost universal use. In New Jersey a view is authorized by statute, long in force, the legality or propriety of which has never been questioned; it allows a view "where it shall be proper or necessary

that the jurors, who are to try the issue, should view the messuages, land or place in question in order to their better understanding the evidence" (Gen. Statutes, page 1851); and the New Jersey Supreme Court has held that if the view is opposed or obstructed, by the defendant or another, it may be enforced by the power of the county, saying: "We can never suffer justice to be defeated by the obstinacy of the party in preventing a line being run." Snyder vs. Vaunate, 2nd Halstead, page 31. See also Bacon's Abridgement, Vol. 5, Title Juries, page 372.

At common law the plaintiff who claimed damages for an alleged mayhem was bound to exhibit the same; and in some cases the fact of a mayhem was triable before a jury of surgeons, who could make the examination themselves. Trials per Pais, page 13. In Regina vs. Ann Wycherley, 8 Carrington and Payne, page 262, at a trial, involving the pregnancy of a woman, by a jury of women, at their request a surgeon was ordered to examine her to aid them in arriving at the truth.

The indelicacy of a proper physical examination is as nothing compared with the disclosures which a party, and even a disinterested witness, is bound to make on a cross-examination, which the law justifies in its endeavor to get at the truth and do justice to all parties.

The exact legal proposition here presented in this case has never been judicially passed upon. It has been touched upon by a number of Courts, including this Federal Court of Last Resort, with varying opinions. A number of these cases are later in date than the Botsford case in this Court; and these later deliverances are entitled to very careful consideration; for no judicial question can be satisfactorily settled, that cannot successfully stand the

test of the most enlightened criticism by learned and impartial jurists, such as are the judges who participated in these later decisions. No respectable Court would deliberately put itself in even apparent opposition to the views, decisions, or judgment of this great Court, involving constitutional or fundamental questions, unless there appeared to be not only strong but convincing and all controlling grounds for such opposition; hence, attention is particularly called to these recent cases; and more especially to McGovern vs. Hope, 42 At. Reporter, 830; Lyons vs. Railway Co., 142 N. Y., 113; Belt Electric Line Co. vs. Allen, 44 S. W. Reporter, 89; Lane vs. Spokane Falls & N. Ry. Co., 57 Pac. Rep., 367 (Wash), and Graves vs. City of Battle Creek (Mich.), 54 N. W. Reporter, 757. In this last case the Court, in commenting on the Botsford case, said: "This decision is entitled to very great weight, but in view of the manifest justice of a requirement that the plaintiff, in case of personal injury, shall produce the best evidence attainable, we think this case should not be permitted to stem the otherwise almost unbroken current of authority upon the subject. It is true that the rule is one of modern growth, but it is also true that actions for personal injury, while not of modern origin, are rapidly increasing, and are constantly presenting new questions. The rule is well recognized by substantially all the Courts of the country, that the injured party may exhibit his wounds to the jury in order to show their nature or extent, and that rule has been followed in this State. Testimony which is open to one party ought logically to be open to his opponent, if it can be obtained with due regard to decency, and in in the orderly conduct of the trial."

One of the most forcible statements on the subject is

from Thompson on Trials, quoted in the opinion of the New Jersey Supreme Court, which quotation is as follows: "In modern trials of civil actions for physical injuries the question has frequently arisen whether the Court has the power to order an inspection of the body of the plaintiff or person injured, for the purpose of ascertaining the nature and extent of the injuries. Some of the Courts, carrying in their minds no higher conception of a judicial trial than the conception that it is a combat, in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and the umpire, have denied the right of the defendant to have an order for such inspection. Other Courts, taking the more enlightened view that the object of a judicial trial is to enable the State to establish and enforce justice between party and party, have held that it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon an application seasonably made, under proper safeguards designated to preserve the rights of both parties, to order such an inspection, and to compel the plaintiff or injured person to submit to it. Another Court has held that, where the plaintiff in such an action alleges that his injuries are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon, based upon a personal examination, unless there is already an abundance of expert evidence, in which case the Court, in its discretion, may refuse to order an examination. Another Court has ruled that the trial court may require the plaintiff in such an action to submit to a medical examination, and dismiss his action if he refuses to comply with the order. This conclusion may be placed on the higher ground that when a person appeals

to the sovereign for justice he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. The conception of the nature and objects of a judicial trial, which denies to the defendant, under proper safeguards, the right of such an inspection, is not higher than that of the old law, which would even not compel a party to produce a deed or private paper in a civil case, where it was intended to be used in evidence against him—a rule which the Court of Chancery invaded to prevent failures of justice, and which has almost entirely disappeared from modern civil jurisprudence."

The object of all government and law is the well being of society, and one of the essentials to that end is a wise and impartial administration of justice, between man and man; and whatever reasonable power a Court needs to effect that result, ought, with the greatest reluctance, to be denied. If a Court may be trusted by law with the great and flexible powers, which it undeniably possesses as essential to the administration of justice, it may also be entrusted with the power to order a defendant to show the wound or hurt for which he seeks damages, or to allow himself to be examined with respect to it by a competent surgeon, under the direction of the Court, that the truth may be revealed and justice be done between him and his adversary, the defendant. In many damage cases the unfortunate defendant has no knowledge or means of knowledge relating to the injury ~~by the defendant~~ except that which the plaintiff brings into Court and exhibits against him, and in this class of cases it would appear that nothing but the grossest injustice could result from the

refusal of the ~~defendant~~ plaintiff and the want of power on the part of the Court to order the plaintiff to undergo a proper examination in Court in respect to the injury for which he is seeking damages. The frequency of personal damage suits, and the fact that in many of them the defendants are without moral fault and without any knowledge of the injury; and that in not a few of them the injury is largely feigned and speedily disappears after an ample recovery, imperatively demand the right of examination, such as is given by the statute in question, to prevent the absolute miscarriage of justice.

The plea of the personal right of the plaintiff in such case to be exempt from the not unfriendly and harmless touch of the defendant's surgeon comes with poor grace from one seeking justice, and ought to be received with ill favor in view of the replication that the requirements of justice, which the sovereign people have assumed to administer through their courts, require it; against such a plea two familiar maxims of the law are applicable. One is, "He who seeks equity must do equity," and the other is, "De minimus non curat lex;" for it savors both of inequity and smallness.

Did Stetson, the plaintiff, who was bound by the New Jersey statute on account of his residence in that State at the date of the accident complained of, get rid of its provisions by crossing the Delaware River and bringing his suit in the Federal Court? We insist on the part of the defendant that he did not, and that he is still bound by the statute.

In the case of the Conn. Mut. Life Ins. Co. vs. Schaefer, 64 U. S., page 458, the Supreme Court of the United States, in discussing this subject, said:

"The laws of the State are only to be regarded as rules of decision in the Courts of the United States where the Constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that is to say, on all subjects on which it is competent for Congress to declare the rules of evidence which shall prevail in the Courts of the United States, not affecting rights of property, and where Congress has declared the rule, the State law is silent."

The same Court in the very recent case of Sheppers vs. Adams, upon this subject, 163 U. S., page 625, said:

"It was the purpose of Congress, by this statute, to bring about a general uniformity in Federal and State proceedings in civil causes, and *to confer upon suitors in Courts of the United States the advantages and remedies provided by State legislation;* and held that a State statute would be enforced in a Federal Court if it was not in conflict with the act of Congress or an established rule of the Court."

In the very late case of Brown vs. The State of New Jersey, his Honor, Justice Brewer, speaking for the Court, among other things, said:

"The State has full control over the procedure in its Courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. Ex parte Roggel, U. S. 642; Iowa Central Rwy. Co. vs. Iowa, 160 U. S., 389; Chicago, Burlington & Quincy Railroad Co. vs. Chicago, 166 U. S., 226.

"The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same

laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding." Missouri vs. Lewis, 101 U. S. 22, 31.

"The State is not tied down by a provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitation heretofore named *it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary.*"

The purpose of the Federal law seems to have been to bring about the greatest possible harmony between the procedure and practice in the United States and in the State Courts. But if the New Jersey statute is to be ignored or held to be void as to those who were residents at the time the cause of action arose, then our system is to be subject to the reproach that important rights may be vested or divested according to the will or caprice of a party by a brief change of residence from one State to another.

The Federal statutes do not prescribe any mode of procedure at a trial inconsistent with the New Jersey statute. There is nothing in them from which it can be reasonably inferred that Congress ever intended to prohibit a Court from making the reasonable order asked for in this case. The statute in question, which relates to evidence, infringes no established rule of evidence in force by the Federal law; and in no adjudged case has such a statute been held to be void.

In conclusion, I most respectfully submit, that there is nothing in the common law, nothing in the Constitution

of the United States, nothing in the Acts of Congress, nothing in any established rule of the United States Court, nothing in right reason, prohibitive of the order in question, which is reasonable in its character and in accordance with the statute of New Jersey; and that under the facts and circumstances of this case it was error in the trial court to deny its power to make the same; and that the Court of Appeals ought to be so advised.

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Feb. 24th, 1900.